Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

OUTLAWS CLUB, located at 5420 Howard Street, Charlotte, NC, More particularly Described in a Deed Recorded at Book 4407, Page 460, Mecklenburg County Registry,

Petitioners; and

MICHAEL WELDON BAZEMORE; CHARLOTTE-MECKENBURG COUNTY TAX COLLECTOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTION PRESENTED

Is the Fourth Circuit in conflict with other circuits in affirming the Trial Court's dismissal of the Petitioners' Claim for a technical defect where the Government admitted it was not prejudiced?

DESIGNATION OF PARTIES

Petitioners David Lowery and Edward Shalkowski, members of the Outlaws Club, have a possessory interest in the property. They are represented by privately retained counsel.

Respondent is the Government.

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OPINION BELOW

A copy of the Unpublished Opinion of the Court of Appeals whose judgment is sought to be reviewed is attached hereto in the Appendix (App. 15.)

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals for the Fourth Circuit denying the Petition for Rehearing was entered on October 21, 1996. This Petition for Writ of Certiorari is filed within ninety (90) days of that date. The Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 4(h)(1)

Service upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from

which a waiver of service has not been obtained and filed, shall be effected:

(1) In a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

STATEMENT OF THE CASE

This is a forfeiture action brought by the United States against the Outlaws Club in Charlotte, Mecklenburg County, North Carolina. Although the Complaint was filed on November 22, 1991, it was not served until February 4, 1992. Pursuant to Rule 4(h)(1), the Complaint was served upon Michael Bazemore, Edward Shalkowski and David Lowery, members of the Outlaws Club.

A claim was filed by Michael W. Bazemore, Attorney in Fact, for the possessors of the property,

members of the Outlaws Club.

The Government did not object to the claim that was filed.

During the discovery process, the power of attorney granted to Michael W. Bazemore was produced for the Government. All documents filed on behalf of the Government referred to the Petitioners as "Claimants".

On January 11, 1995, the case was tried, without a jury before Senior District Court Judge Robert D. Potter. The Government never made an issue of the claim that was filed by Bazemore, nor did it argue that the Court did not have jurisdiction since Bazemore was no longer a member of the Outlaws Club.

After a trial on the merits and before Judge Potter entered his decision, the Government filed

proposed Findings of Fact and Conclusions of Law acknowledging that the Claimant, Michael Bazemore, acted as a representative of the Charlotte Chapter of the Outlaws Club. However, Judge Potter determined that a proper claim was not filed and entered a forefeiture judgment against the property.

The case was timely appealed to the Fourth Circuit Court of Appeals. After oral argument, the appeal was dismissed by an unpublished opinion which was rendered on August 19, 1996. Judge Emory Widener, Circuit Judge, dissented and stated that the Government made no issue of the claim and a dismissal was too far a rigid construction of the rules of pleading in this forfeiture action.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The decision of the Court of Appeals for the Fourth Circuit is in conflict of the previous rulings of

other circuits.

The District Court noted Flores' presence at the scene of the seizure and the circumstances surrounding Flores' alleged relationship to the currency, and the government's complaint clearly specified that Flores exercised some form of dominion over the currency. While Flores' claim itself did not provide evidence of his ownership interest, we hold that in this case, Flores' claim of ownership, coupled with the government's allegation of Flores' involvement with the seized res, are sufficient to establish standing. *United States v. $38,570, US Currency*, 950 F.2d 1108, 1113 (5th Cir. 1992).

There has never been any question by anyone associated with the United States as to whc had a colorable interest in this property. In fact, the Government served three (3) of the members of the Outlaws Club with the complaint and other documents. The Government went further, after a trial on the merits, and stipulated that the claimant was Michael Bazemore, who was acting in a representative capacity for the Outlaws Club.

In accord with the Fifth Circuit in *$38,570 US*

Currency, Id., the Seventh Circuit Court of Appeals viewed the technical defect in the filing of the claim as having no prejudice to the Government.

> These cases teach that, where the putative claimants have placed the court and the government on notice of their interest in the property and their intent to contest the forfeiture, courts will grant extensions of time, recognizing both the good faith effort put forth and the lack of prejudice to the government under such circumstances ... Where the claimants have made a good faith effort to file a claim and where the government can show absolutely no prejudice by the granting of an extension of time, we think it an abuse of discretion to deny an extension of time to amend a claim of ownership, absent any countervailing factors. This is especially true in a case where the defect is technical. *United States v. US Currency in the Amount of $103,387.27*, 863 F.2d 555, 562 and 563 (7th Cir. 1988).

Likewise, the Ninth Circuit in *United States v. 1982 Yukon Delta*, 774 F.2d 1432 (9th Cir. 1985), indicated that the failure to file a verified claim could not prejudice the Government since none of the parties to the proceedings ever disputed or doubted the claimants' ownership. The First Circuit and the

Sixth Circuit are in accord. *See United States v. 1 Urban Lot*, 885 F.2d 994, (1st Cir. 1989) and *United States v. Currency $267,961.07*, 916 F.2d 1104, (6th Cir. 1990).

The Government was aware at all times of who the claimants were and what interest they had. At oral argument, the Assistant United States Attorney admitted that the Government never had any intention of making this an issue at trial.

> As an initial matter, a simple claim of ownership will be sufficient to create standing to challenge a forfeiture ... However where a claimant asserts a possessory interest and provides some explanation of it (e.g., that he is holding the item for a friend), he will have standing ... It was a repeated, colorable claim of possessory and ownership interest which, combined with the fact that the money was taken from Morgan's possession, was more than sufficient to support standing. *United States v. $191,910.00*, 16 F.3d 1051, 1058 (9th Cir. 1994).

The Government continually referred to "claimants" in its own pleadings. The last pleading

the Government filed stipulated that Michael Bazemore was acting in a representative capacity for the Outlaws Club. "When, as here, a claimant has made a sufficient showing of interest in a property through a filing with the court a motion and accompanying affidavits, technical non-compliance with the procedural rules governing the filings of claims may be excused." *United States v. Premises and Real Property at 4492 South Livonia Road,* 889 F.2d 1258, 1262 (2nd Cir. 1989).

The Fourth Circuit Court of Appeals appears to be the only circuit that fails to apply the time-honored principle that admiralty claims should be applied liberally. The other circuits cited here view technical defects such as the one Judge Potter found herein, to be subject to a prejudice to the government analysis. Clearly, the Fourth Circuit Court of Appeals

is in conflict with those decisions. As Judge Emory Widener stated in his dissent, "In my opinion, the dismissal of the case by the district court and the dismissal of this appeal carry too far a rigid construction of both rules of pleading as well as the Rules of Appellate Procedure."

The remedy is simple. A trial on the merits has already been conducted. The matter should be remanded for a decision on the merits.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted, this the 17th day of January, 1997.

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OUTLAWS CLUB, located at 5420 Howard Street, Charlotte, NC, More particularly Described in a Deed Recorded at Book 4407, Page 460, Mecklenburg County Registry,
Defendant-Appellant,

and

MICHAEL WELDON BAZEMORE; CHARLOTTE-MECKLENBURG COUNTY TAX COLLECTOR,
Claimants.

No. 95-1241

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert D. Potter, Senior District Judge.
(CA-91-408-3-P)

Argued: July 10, 1996

Decided: August 19, 1996

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Dismissed by unpublished per curiam opinion. Judge Widener wrote a dissenting opinion.

COUNSEL

ARGUED: Harold Johnson Bender, LAW OFFICE OF HAROLD J. BENDER, Charlotte, North Carolina, for Appellant. B. Frederic Williams, Jr., Assistant United States Attorney, Charlotte, North Carolina, for Appellee. **ON BRIEF:** Mark T. Calloway, United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

On November 22, 1991, the government filed a civil forfeiture action in the district court against the clubhouse occupied by the Charlotte, North Carolina, chapter of the Outlaws motorcycle club, and the lot upon which it is situated. On March 9, 1992, Michael W. Bazemore, then a member of the Outlaws, asserting that he was "attorney-in-fact for the record owners of the property," filed a claim contesting the forfeiture. Neither the club itself[1] nor any other members filed claims.

Following a lengthy period of discovery, culminating in a bench trial, the district court entered a final judgment of forfeiture on behalf of the government on January 23, 1995. Eight days later, a notice of appeal was filed in the district court that stated:

---

[1]Under North Carolina law, unincorporated associations have the capacity to sue and be sued. N.C. Gen. Stat. § 1-69.1 (1983). It therefore appears that the Outlaws could have filed its own claim in the forfeiture proceeding, and that such a claim need not have named individual members of the club. Indeed, we note that the government's complaint for forfeiture named "The Outlaws" as a "person" who "may have or claim an interest in the defendant property."

> NOW COMES *the Defendant*, by and through its attorney, and gives Notice of Appeal to the Fourth Circuit Court of Appeals from the Memorandum of Decision and Order and Judgment entered by The Honorable Robert D. Potter on January 23, 1995.

(emphasis supplied). The notice of appeal was captioned *United States v. Outlaws Club, located at [etc.]*, the same as all other filings and orders in the proceedings below. No other notices of appeal from the final judgment were filed.

Under the federal rules, a notice of appeal

> must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. . . . An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

Fed. R. App. P. 3(c). The notice of appeal filed in this case specifies that it is being taken on behalf of "the Defendant," which, in this *in rem* proceeding, is merely the real property that is the subject of the action. However, inasmuch as pieces or parcels of real property are not themselves "owners" within the meaning of the federal forfeiture statutes, they have no legal standing to contest their own forfeiture. *United States v. One Parcel of Real Property*, 831 F.2d 566, 568 (5th Cir. 1987).

The notice of appeal nowhere specifies that it is being taken on behalf of Bazemore, and his intent to appeal is not otherwise clear therefrom.[2] Although one might conclude from all the circumstances that Bazemore intended to appeal (insofar as he was the only party

[2]The notice of appeal not only fails to name Bazemore anywhere in its caption or body, but it also affirmatively states that the entity taking the appeal is doing so "by and through *its* attorney," instead of "by and through *his* attorney." Thus, quite apart from the notice's failure to offer any positive evidence of Bazemore's intent to appeal, a plain reading of the document would appear to support the opposite conclusion.

with legal standing to appeal and that a notice of appeal was in fact filed), Rule 3(c) specifically states that a party's intent to appeal must be discernible "from the notice," rather than from the *filing* of the notice.

The failure of a party to comply with the specificity requirement of Rule 3(c) divests the court of appeals of jurisdiction to hear the appeal so noted. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); *Mallas v. United States*, 993 F.2d 1111, 1116 (4th Cir. 1993). In *Torres*, Justice Marshall, writing for the seven-Justice majority, stated: "The failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal." *Id.* at 314.[3] Hence, though Bazemore was the only party entitled to appeal the judgment below, it is evident that he has not.

Because it appears to this court that it lacks jurisdiction to consider the appeal filed in this case, that appeal is hereby

DISMISSED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

The lack of jurisdiction upon which this case is decided is based upon the mere fact of an oversight in filing with the court papers a power of attorney executed by the three grantees in the deed to the property, the record owners thereof, who had executed a power of attorney to Bazemore, a claimant in this case, to prosecute the claim on their behalf.

This power of attorney was seen by the government, which yet acknowledges that it exists, and merely was not filed through the oversight of Bazemore's attorney. A trial on the merits was held in

[3]Although the applicability of *Torres* to appeals from judgments against multiple parties has been somewhat curtailed by subsequent amendments to Rule 3(c), its general declarations respecting the effect of a party's clear failure to comply with the Rule surely remain viable.

which no issue was made of any lack of authority on the part of Bazemore to proceed with the case.

Even at oral argument on appeal the following question and answer took place:

> The Court: The grantees in the deed apparently had given him [Bazemore] the power of attorney?
>
> Assistant United States Attorney: The United States had no intention of making an issue of that at trial.

In my opinion, the dismissal of the case by the district court and the dismissal of this appeal carry too far a rigid construction of both rules of pleading as well as the Rules of Appellate Procedure.

I would vacate the judgment of the district court and remand the case for a decision on the merits. The matter has already been tried.